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No. 96-1566

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOUGLAS L. FOWLKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 666(a)(1)(B), which prohibits the acceptance of a corrupt payment by an official of a local government agency that receives more than $10,000 in federal funds in a year, requires proof that each payment in a series of payments to an official influenced or rewarded a specific official act.

2. Whether Section 666(a)(1)(B) requires the government to prove that the corrupt payment affected or could have affected the federal funds received by the local government agency.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 100 F.3d 970 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1996. The petition for a writ of certiorari was filed on January 23, 1997. A motion to amend the petition for a writ of certiorari to add a question presented was filed on April 21, 1997, and is therefore out of time under this Court's Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of accepting corrupt payments, in violation of 18 U.S.C. 666, and three counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to 41 months' imprisonment, to be followed by three years' supervised release, and was fined $25,000. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner was a member of the City Council of Atlanta from 1961 to 1993. Harold Echols was a subconcessionaire at Atlanta Hartsfield International Airport. Echols' rent depended upon the terms of the concession agreement between the City of Atlanta and the principal concessionaire, Dobbs Paschal Midfield Corporation. See Gov't C.A. Br. 2-4. The indictment alleged that, on 49 occasions, petitioner received cash from Echols, intending to be influenced or rewarded in connection with business or transactions of the City of Atlanta relating to concessions at the Airport. *Id.* at 2, 5-10; Superseding Indictment 1-2.

From 1986 through 1993, Echols made cash payments to petitioner, ranging from $100 to $350, at breakfast meetings, usually occurring weekly. During the period in which the payments were made, petitioner favored Echols' interests in matters before the City Council involving the subconcessionaires at the Airport. For example, in the summer of 1987, petitioner opposed the City's buyout of the principal concession agreement, which would have been unfavorable to Echols, but supported an amendment to the agreement that would have benefited Echols. Gov't C.A. Br. 7-8. Just before the debate and favorable vote

on that issue, Echols paid for the airline tickets for a vacation for petitioner and his wife. *Id.* at 7. In 1989, a further rent-reduction proposal was supported by petitioner and passed out of his committee, which oversaw matters relating to the Airport. *Id.* at 8. Petitioner issued a press release supporting the proposal. The 1989 proposal was tabled to allow consideration of the view of the incoming mayor. During the period of consideration, Echols gave petitioner a diamond bracelet for petitioner's wife. *Id.* at 8-9. In 1990, petitioner supported another amendment to the concession agreement that would have resulted in a rent reduction for Echols. When petitioner told Echols that he would be on vacation during the vote and would not return if he had to pay for the trip himself, Echols paid for round-trip airfare and a rental car so that petitioner could attend the vote. The amendment passed with petitioner's support. *Id.* at 9.

In 1992, Ira Jackson, who was the newly appointed Commissioner of Aviation and who was also accepting regular payoffs from Echols, proposed an entirely new concessions program. Jackson's proposal called for the termination of the concessionaire agreement and for substantial rent reductions for the subconcessionaires, including Echols. Despite the estimate of the City's Department of Finance that the new proposal would cost the City between $35 and $40 million, petitioner supported it. The proposal was abandoned when Jackson resigned as Commissioner of Aviation. Gov't C.A. Br. 9-10.

In late 1992, Echols began to cooperate with the FBI in the investigation of corruption in connection with the Airport. At a January 6, 1993, breakfast meeting with petitioner, Echols wore a hidden record-

ing device while the two men discussed the federal investigation and how to avoid detection. Gov't. C.A. Br. 11. After that breakfast meeting, Echols made his usual $350 payment to petitioner, which was captured on videotape and audiotape. *Id.* at 12.

2. The offense under Section 666(a)(1)(B) provides, in pertinent part:

> Whoever, if the circumstance described in subsection (b) of this section exists —
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof —
> >
> > * * * * *
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years or both.

The "circumstance described in subsection (b)" referred to in the first clause of Section 666(a)(1)(B) is that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). Accordingly,

to obtain a conviction under Section 666(a)(1)(B), the government must show (as relevant here) that (1) the defendant was an agent of a local government; (2) the local government received more than $10,000 in a year in federal assistance; (3) the defendant corruptly accepted something of value intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of the government; and (4) the transactions of the agency connected to the corrupt payment involved something worth at least $5,000.

At trial, petitioner requested a jury instruction that the government was required to prove that petitioner accepted payments from Echols "with the intent to be influenced, or with the knowledge that it represented a reward for some particular past action, or series of transactions on [petitioner's] part." Pet. 22-23. Petitioner also requested a charge that the bribery prohibited by Section 666 "imports the notion of some more or less specific quid pro quo for which the gift or contribution is accepted." Pet. 23.

The district court declined to give those instructions. Instead, in instructing the jury on the Section 666 offense, the district court tracked the language of the statute, charging that, to find petitioner guilty, the jury was required to find that he "corruptly accepted or agreed to accept something of value from someone, [and that] he did so intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of [the City of Atlanta]." Pet. 24; 8 Tr. 162. The court further instructed the jury that, "[b]y definition, a bribe is money or favor bestowed on or promised to a person in a position of trust to pervert his judgment or influence his conduct." Pet. 24; 8 Tr. 163. The court

also charged that "[t]o act 'corruptly', as that word is used in these instructions, means to act voluntarily and deliberately and for the purpose of improperly influencing any business, or transaction, or series of transactions of the [City of Atlanta]." Pet. 24-25; 8 Tr. 163.

The jury found petitioner guilty on the Section 666 count involving the payment captured on audio and video tape. Petitioner was acquitted on all the other Section 666 counts.

3. On appeal, petitioner argued that the district court had erred in refusing to charge the jury that Section 666 requires a *quid pro quo*, *i.e.*, that the payment represented an exchange or reward for a specific official act. Petitioner did not argue that Section 666 requires proof that the corrupt payment he received affected or could have affected the federal funds received by the local government agency for which he worked.[1] The court of appeals affirmed the

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[1] Petitioner did argue on appeal that the government was required, and had failed, to prove that $10,000 in federal assistance had been received by the Atlanta Airport, rather than the City of Atlanta as a whole. Pet. C.A. Br. 30-31. Petitioner stated that "[t]he question raised by this appeal is whether the $10,000 may be received by the City in any of its programs, or whether the federal funds must be received by the agency which is involved in the bribe." *Id.* at 30. In making that argument, petitioner also stated that "the government failed to prove that the bribe had any [e]ffect (or was designed to have any effect) on an agency or program which received any federal funds." *Id.* at 31. That last statement, however, does not appear to have been an attempt to argue the precise issue presented in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997), namely, whether a bribe punishable under Section 666 must be shown to have affected, or have had the potential of affecting, federal funds.

convictions in an unpublished per curiam memorandum. The court set forth the arguments petitioner had asserted on appeal and stated, "[w]e have carefully reviewed the record in light of [petitioner's] contentions and find no reversible error." Pet. App. 3a-4a.

DISCUSSION

1. a. Petitioner argues (Pet. 22-26) that the district court erred in refusing to give his requested jury instruction that Section 666 requires proof that a payment was accepted for some "particular past action or series of transactions" (Pet. 23) on the part of a government official. He also contends (Pet. 10-21) that the evidence was insufficient to show that the payment he took from Echols on January 6, 1993, was accepted in exchange or as a reward for a specific official act. Those contentions are without merit. The district court instructed the jury correctly on the elements of Section 666, and the evidence was sufficient to support the jury's finding of a corrupt payment under the proper instruction.

Section 666(a)(1)(B) punishes the receipt of a payment that is accepted corruptly, and with the intent on the part of the recipient "to be influenced or rewarded in connection with any business, transaction, or series of transactions" of the local government entity for which the defendant works. The government is required to prove that the recipient accepted the payment with the intent to be influenced in, or rewarded for, an *improper* official act. See *United States* v. *Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990). The corrupt payment must be given to induce favorable action in the future, to reward favorable action taken in the past, or both. The difference between the two theories of liability under Section

666(a)(1)(B) is the relative timing of the corrupt payment and the official transaction or series of transactions to which it is connected: a corrupt payment intended to influence official actions is given before, and in connection with, official actions to be taken in the future, whereas a corrupt payment intended to reward official actions is given after, and in connection with, such actions taken in the past. See *United States* v. *Santopietro*, 996 F.2d 17, 20-21 (2d Cir. 1993), cert. denied, 510 U.S. 1092 (1994).

The district court correctly instructed the jury that Section 666(a)(1)(B) requires a connection between a corrupt payment and an improper official transaction or series of transactions. The court instructed the jury that it could convict petitioner only if it found that he had accepted Echols' payment corruptly, and "intending to be influenced or rewarded in connection with" city transactions. Pet. 24. It also charged that "[t]o act 'corruptly', as that word is used in these instructions, means to act voluntarily and deliberately and for the purpose of *improperly* influencing any business, or transaction, or series of transactions of the government of the [C]ity of Atlanta." Pet. 24-25 (emphasis added). And it further charged that, "[b]y definition, a bribe is money or a favor bestowed on or promised to a person in a position of trust to *pervert* his judgment or influence his conduct." Pet. 24 (emphasis added). Those instructions made clear to the jury that, to find petitioner guilty, it was required to find that he accepted money from Echols as a reward or inducement for taking improper official actions on Echols' behalf, and that there was a connection between the payment and the official transactions. There was no reasonable possibility that the jury would have

convicted petitioner if it had found that the payment he received was a legitimate loan, a proper campaign contribution, or a gratuity intended merely to cultivate general good will on the part of petitioner.

The evidence showed that the January 6, 1993, payment was one of a series of payments intended both to influence and reward petitioner in connection with acts he took in favor of Echols' business interests at the Airport. Petitioner was Chairman of the City Council's Transportation Committee at the time of the January 6, 1993, videotaped payment on which the count of conviction was based. He had taken numerous actions on Echols' behalf in his capacity as Chairman. Also, during the January 6, 1993, breakfast meeting at which the payment was given, petitioner and Echols discussed at some length the City's negotiation with Dobbs Paschal, the fact that negotiations had been ongoing for two years, and the fact that, under the terms of the Principal Concessionaire Agreement, the subconcessionaries had the right to remain at the Airport through 1995. Gov't C.A. Br. 31. The videotaped evidence of the payment thus supported a conclusion that Echols was continuing to pay petitioner for favorable actions that petitioner had already taken on his behalf in the past, as well as for favorable actions that petitioner would be in a position to take in the future. Petitioner was, in effect, "on retainer" while the cash payments were made in order to give Echols favorable treatment whenever concessions matters arose.

Petitioner appears to argue that the government was required to prove that each separate payment was given and received in exchange or as a reward for a separate official act. The statute contains no such requirement. Corrupt payments may be punished

under Section 666 if they are "rewards for past [actions] and bait for [future ones]." *United States* v. *Little*, 889 F.2d 1367, 1369 (5th Cir. 1989), cert. denied, 495 U.S. 933 (1990). Petitioner was, in effect, on Echols' regular payroll, accepting periodic payments to act in Echols' interests when concessions matters arose. Thus, each payment in the series was given and accepted in connection with all of the favorable actions that petitioner took on Echols' behalf in his official capacity during the relevant period. The fact that the illicit payments were made too frequently for each payment to be tied to one and only one particular act enhances, rather than diminishes, the corrupt nature of the payoffs. And although the jury found petitioner guilty only on the count arising out of the payment captured on videotape, the acquittals on the other counts do not vitiate the government's proof that the payment captured on videotape was one of a series of payments that, in combination, were intended to influence and reward petitioner with respect to acts in his official capacity favorable to Echols.[2]

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[2] Petitioner suggests (Pet. 17) that *United States* v. *Medley*, *supra*, holds that Section 666 requires proof that a payment is accepted in exchange for a separate and discrete official act. That case, however, concerned a single $25,000 payment; the court did not address a situation involving a series of payments, nor did it suggest that each payment in a series must be linked to a separate official act. Cases involving retainer payments similar to those made in petitioner's case have found a violation of Section 666. See *United States* v. *Santopietro*, *supra* (corrupt payments received over several months); *United States* v. *Mariano*, 983 F.2d 1150, 1152 (1st Cir. 1993) (cash payments made over a substantial period of time); *Little*, 889 F.2d at 1369 (routine payoffs over a period of time).

b. Petitioner also argues that the proof in this case showed only that he received a gratuity for a past act, and not a bribe in exchange for a promise on his part to perform a specific official act in the future (Pet. 13-19). The case, however, was submitted to the jury on the theory that petitioner accepted the payment with the intent to influence *or reward* an official act. See Superseding Indictment 2. Thus, the jury could have properly found petitioner guilty if it concluded *either* that he corruptly accepted the $350 from Echols in connection with actions that he had already taken on Echols' behalf *or* that he accepted the payment corruptly intending to take actions on Echols' behalf in the future.

Contrary to petitioner's contention, the fact that liability may be based under Section 666 for corrupt acceptance of a reward for past acts does not blur the distinction between a corrupt payment and a gratuity. Although courts have occasionally referred to Section 666 as punishing gratuities, they have used that term only to make clear that Section 666 punishes corrupt payments given and taken in connection with past acts as well as acts in the future. "Thus, the current statute continues to cover payments made [or accepted] with intent to reward past official conduct, so long as the intent to reward is corrupt." *United States* v. *Bonito*, 57 F.3d 167, 170-171 (2d Cir. 1995), cert. denied, 116 S. Ct. 713 (1996); see also *United States* v. *Coyne*, 4 F.3d 100, 111 (2d Cir. 1993), cert. denied, 510 U.S. 1095 (1994); *United States* v. *Crozier*, 987 F.2d 893, 898-899 (2d Cir.), cert. denied, 510 U.S. 880 (1993).

Petitioner relies (Pet. 11-12) on a different statute, 18 U.S.C. 201, and to the distinction in that provision between bribes and gratuities. He also refers (Pet.

18-19) to the different punishments under Section 201 for the bribery and gratuity offenses. That distinction drawn under Section 201 between bribes and gratuities has little relevance to this case. Section 666 plainly requires that the payment must be corruptly received to influence or reward the defendant in connection with transactions of his government agency, whether the payment is made before or after the official acts. A defendant could not be convicted under Section 666 without proof that the payment was connected to an official transaction or series of transactions.

Referring to cases under the Hobbs Act, 18 U.S.C. 1951, such as *McCormick* v. *United States*, 500 U.S. 257 (1991), petitioner also argues (Pet. 19-21) that a strict *quid pro quo* requirement is essential to avoid punishing public officials for accepting campaign contributions. The requirement of Section 666 that the payment be "in connection with" the official transaction or series of transactions is sufficient to accomplish that objective. If petitioner had accepted the $350 payment not as a part of series of payoffs for his favorable acts, but rather as a campaign contribution, he could not have been found to have "corruptly" accepted it "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of his agency, as required by Section 666.

2. In a motion for leave to amend his certiorari petition, filed outside the time for filing a petition for a writ of certiorari under this Court's Rule 13.1, petitioner seeks to raise the additional question whether Section 666 requires the government to prove that the bribes proscribed by the statute affected or could have affected the federal funds

received by the local government agency for which the defendant works. That is one of the questions presented in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997). Petitioner did not raise that contention in the district court or in the court of appeals, and the court of appeals did not pass upon it in this case. In a companion case, however, also arising out of the bribe transactions involved in this case, the court of appeals has held that Section 666 does not require the government to show that a bribe could have affected federal funds. See *United States* v. *Paradies*, 98 F.3d 1266, 1288-1289 (11th Cir. 1996), petition for cert. pending, No. 96-1346.

The Court's decision in *Salinas* may affect the court of appeals' treatment of petitioner's conviction in this case. Accordingly, should the Court grant petitioner's motion to amend his certiorari petition, the petition should be held for the decision in *Salinas*, and then disposed of as appropriate in light of the decision in that case.[3] Should the Court hold in *Salinas* that Section 666 does not require the government to prove that the bribe affected or could have affected federal funds, then the petition should be denied. Should the Court hold in *Salinas* that Section 666 does contain such an element, then the court of appeals will be free on remand to consider whether petitioner has waived that argument, in light of his failure to raise it on his initial appeal.

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[3] We have suggested that the Court hold the petition in the companion case of *Paradies* pending the decision in *Salinas*.

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be denied. As to the question presented by the motion to amend the petition, the petition should be held for the decision in *Salinas* v. *United States*, No. 96-738, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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